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Supreme Court of the United States

OCTOBER TERM, 1941

No. 256

DR. MAXIMILIAN GOLDSTEIN, DR. BENJAMIN SCHWARTZ, HERMAN RUBIN AND IRVING ELENTUCH, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 11, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Charge of the Court

The Court: Members of the jury: You have been listening to the testimony in this case now since the 3rd of June. On each of the court days you have been prompt and diligent in your attendance, and as nearly as I have been able to observe you were following the testimony carefully.

This has been an unusual tour of duty, and I want to say at the outset that I understand that under the rules of this court none of you will be called for service for a period of two years by reason of the length of the present task. If, in addition to that, any of you desire to be excused for a longer period, if you will make your request known to the clerk I shall be glad to endorse it. Please bear that in mind.

Various counsel in this case have, possibly from a desire to lighten the burden of the Court, instructed you in matters of law in making their summations. They told you what the burden of proof is; they have described reasonable doubt; they have told you the effect of rulings, and so on. It is my [fol. 2] duty to instruct you in those matters. The law provides that that is the task of the Court and that you must take your instructions as to the law from the Court. The reason is that if the Court makes a mistake in any of those matters the law provides a method of correction, so that you may freely rely upon what the Court tells you so far as the discharge of your own responsibility is concerned. If, however, you should happen to rely on what some counsel has told you, and if he were in error, there would be no way for correcting that mistake. That is the reason that I mention at the outset that it is your duty to take your instructions as to the law from the Court.

You understand full well by this time that this is a criminal cause, and in such a case each defendant is presumed to be innocent, and that presumption attaches to him from the outset of the trial until the jury shall return with its verdict. In order to overcome that presumption the burden rests upon the government of proving guilt beyond a reasonable doubt.

For the benefit of those of you who may not heretofore have sat in criminal cases, I propose to discuss that requirement for just a moment. It is your duty to weigh carefully all the evidence, in the case, apply your reasoning faculties to the evidence, and if, having done so, your reasoning faculties tell you that there is a doubt as to the guilt of any de-
[fol. 3] fendant, it is your duty to return a verdict of acquittal as to that defendant.

In so applying your reasoning faculties you must recall that it is a rational process in which you indulge. Your emotions have no part in your deliberations. The favorite type of emotion, as perhaps you know, is prejudice; another one is sympathy. Neither of those emotions, nor any others, are to be permitted to enter into your deliberations. You can conceive, if you like, that this is just as rational a concern on which you are about to embark as adding a column of figures. If you add 2 and 2 and 3 and 3 and 4 and 4, I think the result is 18. You cannot influence that result by being sorry that it is 18 or wishing that it were 17 or wishing that it were 19. So in this case you will determine what the evidence is and then you will see whether it adds up to anything or not, uninfluenced by any considerations of prejudice of any kind, or of sympathy of any kind. That is what your oath calls upon you to do.

If any witness in this case, and I think there have been about sixty who have testified, has done so falsely with respect to a material issue in the case, you have the right to disregard that witness's testimony because of the false element. You have also the right to reject from that testimony only that which you find to be false, and you may, if you choose, rely upon the balance of what he says. In that re-
[fol. 4] spect your judgment is untrammeled and it is for you to exercise, and you alone.

During the course of the trial it has been necessary for the Court to make rulings on objections and on motions. Those are called questions of law. In making those rulings the Court has intended to reveal no opinion as to the guilt or innocence of any defendant. If you think you have observed such an opinion, it is your duty to disregard it, because the question of the guilt or innocence of each defendant is exclusively for the jury to determine.

As to certain defendants, perhaps all, so-called character witnesses have been called to testify. That term in itself is misleading. They are not character witnesses; they are

reputation witnesses. You know a man's character is what he is; his reputation is what people think he is. And that necessarily is a matter of opinion. Reputation evidence is legally admissible. It is to be considered as part of the evidence in the case. If that reputation evidence is accepted and believed by the jury it may be that the task of the government of proving guilt beyond a reasonable doubt is thereby increased. It may be heavier because the jury accepts that evidence than it would be if that evidence were not in the case.

Of course you realize that much of the evidence in this [fol. 5] case is circumstantial. Circumstantial evidence is indirect evidence, and like indirect lighting it may be illuminating. A simple example of circumstantial evidence would occur if you should look out of the window and observe that — is raining, and in a moment or two a man should enter the room where you are with his hat and garments wet. That would be circumstantial evidence that he had been out in the rain, although you had not observed him out in the rain. Circumstantial evidence, as I say, is indirect. It may be extremely important. It may be relied upon by the jury in reaching a verdict; but in order that you may rely upon it to support a verdict of conviction, a verdict of guilty, circumstantial evidence must point inevitably to guilt. Circumstantial evidence which is consistent with innocence may not be relied upon to support a conviction.

Now as to this indictment. You have been told that it is a formidable and weighty document. It is. But don't be misled as to its efficacy. An indictment itself is not a self-proving document. It is a charge; and in order that it may be sustained the government is called upon to prove the allegations in the indictment by the measure of proof which I have explained to you.

It contains 30 counts, 29 of which have to do with this scheme to defraud, and the 30th is the conspiracy [fol. 6] count.

The scheme to defraud as outlined in the indictment calls attention to the presentation to insurance companies, which are called the victims, of false and fraudulent claims on behalf of the holders of insurance policies containing this disability clause whereby the companies were induced to pay money, and that that was due through the instrumentality of lawyers, doctors and chasers.

So far such a crime would not lie in this court. The reason that it is here is that the indictment alleges that in the perpetration of that scheme to defraud the United States Mails were used. Of course that is unimportant in a practical sense. The scheme might have been carried out if messengers were used to deliver communications; but the indictment alleges that the United States Mails were used, and the proof is that as to each of the first 29 counts, one or more communications were mailed; so that so far as the jurisdictional question is concerned there is no problem presented to you whatever. The mails were used and that is not contested.

The 30th count, as I say, is the conspiracy count. You are to understand the legal implications of that allegation. If two or more persons engage in the commission of a crime, the law says that before they commit the crime ordinarily they enter into a conspiracy to do it. You will see why [fol. 7] that must be so. The very fact of cooperation argues an antecedent understanding on the part of the two or more persons who so cooperated, and in the eyes of the law a separate crime is committed when the joint enterprise is agreed upon, providing that at least one thing is done to carry that joint enterprise into effect. There may be more than one step taken, but in order that criminal responsibility may attach for the entry into, and carrying out of the conspiracy, there must be this sort of action, followed by the doing of at least one thing to carry that concert into effect.

This indictment alleges 65 acts. Those are called overt acts, and it is not necessary to dwell at length upon them at this time. I am merely explaining to you now the nature of this indictment, the nature of the two crimes that are charged, in order that you may have clearly in mind how to apply the evidence to those two crimes.

The indictment is quite circumstantial in describing this crime. It says that the scheme involved these claims for total disability when, in fact, total disability did not exist, and in connection with the presentation of those claims the compilation of false medical records, including the dates of treatment; histories, diagnoses, imaginary ailments; the operation of Garrows' law office in which Weiner [fol. 8] was assistant; the activities of Jesse Isaacson and Abram Isaacson with Garrow; the payment by Joseph and

Elias Garrow of expenses, doctors' bills, hospital bills and so forth; the activities of Elentuch as a chaser, when he brought claimants to Garrow, in cooperation with Panzer and Heller; the filing of false claims, the claims being known to be false by both the claimants themselves and the Garrows; the coaching of claimants so as to prepare them to present their claims in a convincing way; hospitalization on the part of claimants when none was required, which involved the fabrication of false hospital records; the activities of Maximillian Goldstein and Benjamin Schwartz, with Dr. Messman, Dr. Rosenbaum and others, in falsely certifying to heart ailments; falsely certifying to dates of treatment; and the self-medication on the part of the claimants; the use of digitalis prior to the taking of these e k g's, and the sending of these claimants, or some of them, to eminent specialists for the purpose of securing certificates or reports from them to be used in behalf of the false claims—that is the scheme in general; and with reference to each of the 29 counts it is alleged that it was part of the scheme that the United States Mails should be used in furtherance of it.

I think it is unnecessary to recount the 65 overt acts that are said to have been *down* by some or all of the [fol. 9] defendants in behalf of the conspiracy to put that scheme into operation. If the evidence convinces you that at least one overt act was committed, provided you find the conspiracy to have been entered into, that is sufficient to sustain a conviction as to the conspiracy count, and it is not necessary that each defendant shall have been shown to have committed one or more of the overt acts, because the theory of a conspiracy is a concert of a partnership activity, in which all of the partners become responsible in the eyes of the law for the act of any one partner, with the reservation of course that the act to which I have referred is an act in furtherance of the conspiracy.

As I say, there are 29 of these mail fraud counts, and if you should find that there were such a scheme to defraud, and that each defendant, or any defendant, entered into and became a part of that scheme to defraud, you would be justified in finding that each defendant who did so participate is legally accountable for every one of the separate acts. But it seems to me that that is putting a very heavy burden before the jury, because it would require that you examine this entire testimony really six times, because

there are six defendants. And in order to save you such tedious and practically unnecessary task, I have drawn up a schedule which contains at the top the count numbers. The lefthand column is headed with the word "Defend- [fol. 10] ants" and under the word "Defendants" the name of each of the six defendants now on trial, and then I have indicated in the appropriate space that there is testimony tending to connect that defendant with that count in the indictment. I propose to deliver that to you for your use in the juryroom.

In order that the record may be complete on the subject I am charging the jury that there is evidence in the case concerning the defendant Goldstein with respect to counts 17, 18, 21, 22, 23, 24 and 25; with respect to the defendant Schwartz with reference to counts 3, 12, 13, 24 and 25; with respect to the defendant Rubin with reference to counts 24 and 25; with respect to the defendant Cooper with reference to counts 14, 15 and 16; with respect to the defendant Hessenberg with reference to counts 26, 27, 28 and 29; with respect to the defendant Elentuch with reference to counts 19 and 20.

As to the counts not referred to in the statement just made, I am granting the defendants' motions to dismiss, for, it seems to me, that there is not that character of evidence which would justify my submitting to the consideration of the jury the question of guilt on any of the counts which I have not mentioned.

I suppose it is clear to you by this time that you are dealing in this case very largely with what must have gone [fol. 11] on in the minds of several of the defendants. Human ingenuity has not thus far devised anything which would give us a chart, like these electrocardiograms which repeat pulsations of the human heart, which would depict for us the operations of the human mind; nor have we the facility for looking into the human mind. All that we can do is to examine critically the conduct of a given individual, and having done that, reach a conclusion as to what that individual intended or knew before he engaged in the conduct which is the subject of our examination. That is rather a critical and important process, and in doing it I think you will find, and I am sorry that I shall probably have occasion to repeat this expression, that we must first examine all that is known before we try to determine what was in the mind of a given man with respect to that which

is not precisely known. We move from the known to the unknown.

Counsel have paid their respects to the insurance companies and to the activities of insurance company lawyers as though there was something to be ashamed of in the fact that the United States Government has presented this case; as if insurance companies should not be protected from fraudulent enterprise. Of course the precise contrary is the fact. One or more insurance companies have the perfect right to call upon the law-enforcing branch of [fol. 12] the State or Federal Government to protect them from fraud. So you will please disabuse your minds, if you can, of any prejudice born of that aspect of the case.

I wonder if you recall a chance remark that Mr. Garrow made on the stand? I am going to refer to it, not only for its importance in this case, but by way of giving you something to think about when you serve on a civil jury some time. He said, quite by way of comment, "You know insurance companies are not treated well by juries." Do you recall his saying that? I don't know why that should be so. I am afraid it is so. I am afraid that juries are very willing to spend insurance company money so I think you ought to recall that remark made by a lawyer who was engaged for a number of years in depriving insurance companies of their money.

Now, as to Messman and Garrow, it is quite true that they revealed, as to each of them, a very low moral character. I do not wish to say very much more on that subject than has already been said repeatedly. But as a member of the legal profession, and as one who greatly admires the medical profession, I want to remind you members of the jury of this: Messman and Garrow are not crooks because one of them is a lawyer and the other is a doctor. They would have been crooks if they had been blacksmiths [fol. 13] or plumbers or carpenters or builders. They were naturally crooks. And you will have to examine their testimony in the light of that knowledge. They were co-conspirators, and unless they have been contradicted, and that contradiction has escaped me, there is one portion of their testimony that you may accept freely, and that is that they were conducting this conspiracy. They told you how it was started, and they told you how it prospered over the years, and no one has contradicted that, so that the scheme to defraud as depicted by Barrow and Messman really did

exist, and it was the source of very material revenue. So much of their testimony stands uncontradicted unless I am greatly mistaken.

Since they are co-conspirators, and since they are individuals of the character which they have clearly revealed, it is your duty to scrutinize their testimony with the utmost care, and you would be wise if you insisted on its corroboration in examining the conduct of the defendants now on trial. You may find—I say you may find; I am not trying to tell you what you must find—you may find corroboration of some of the things that they said in the documentary evidence in the case; you may find it in what was said by witnesses other than themselves, including the defendants; and you may recall the statements made by them, which are [fol. 14] undisputed, but we start on this firm ground, that the scheme to defraud was created and did exist, and the precise question which you are called upon to examine is, Was each of these defendants implicated in that scheme? That is, did he intentionally and knowingly lend himself to the scheme to defraud, and did he participate, or seek to participate, in the objects sought to be accomplished.

At the outset of discussing the testimony I wish to say, if you will permit me to do so, if I were a member of this jury I should not rely upon the statement of Messman, I think it was, that Dr. Goldstein enjoyed the reputation of a fee splitter in the Sydenham Hospital, nor should I accept the testimony of Garrow that Dr. Schwartz was a notorious fee-splitter. I should consider that that testimony was not in the case. In the first place it is not an issue before you. It may be true or it may be false, but it is not an issue in this case.

Moreover, if I am capable of observing, those two observations were volunteered by those two witnesses; nothing in the questions that were being propounded to them called upon them to make those statements, and I advise you to disregard them.

I propose to discuss the evidence in the case, members of the jury, not at great length. You have been exposed to that process for the past two days. I am going to comment [fol. 15] on part of the evidence, although "comment" is the wrong word perhaps. I am going to direct your attention to part of the evidence in the hope of clarifying your task. If in doing that I should be betrayed into stating something concerning the testimony which does not accord

with your recollection and your understanding of the testimony, of course you must disregard what I say. It is just an honest mistake. Nor in commenting on the testimony do I intend to suggest now what your conclusion should be. I may suggest to you that you may wish to ask yourselves certain questions. In doing that I do not insist, I have no right to insist, that you ask yourselves those questions. You have a right to disregard them.

Moreover I do not intend to suggest what the answer to those questions may be. So that with that understanding, and I guess it is clear between us, let us view some of the aspects of this long and huge volume of testimony. And I ought to say one further thing, that by calling your attention to certain incidents I do not mean to insinuate that they are the only important elements in the case. I simply mention that those particular matters occur to me as being important for me to discuss with you. I do not mean to suggest that all other evidence in the case is unimportant, because the contrary is the fact. It is all important.

[fol. 16] You will see, I suppose, without thinking about it very much, that these defendants resolve themselves into three groups. First, there is Elentuch, said to have been a chaser; second, there are the holders of the policies, the claimants—Cooper, Rubin, Hessenberg. They are in a group; and then there are the two doctors, Goldstein and Schwartz, said to have been used by Garrow, and by Garrow and Messman in cooperation with the claimants, for the purposes that have been described.

It is always helpful if you take up a complex situation at the easiest end and see what you know is clearly established. And according to that theory I should examine the Elentuch case. That is quite simple.

Elentuch admits that he took Ellenbogen to Garrow and that he received $300 of Garrow's fee. If I am not mistaken Garrow's checks were produced. I think there was a $300-check and two $25-checks. Moreover, Elentuch has made three statements, two of them signed and one unsigned. It is conceded that he was caused to take Ellenbogen to Garrow's office because of what Panzer told him, Elentuch, about Garrow. He has not told us whether Panzer told him, Elentuch, all that Garrow had done to promote Panzer's own claim. We have heard some testimony on that subject, and of course it is left rather for you to consider whether it would have been likely that Elentuch

[fol. 17] would have taken Ellenbogen to Garrow and share his commission from Garrow with Panzer unless he had had from Panzer a pretty clear explanation of the Garrow technique. Be that as it may, Garrow did say on the witness stand, and it is for you to say whether it is worth anything or not, that in the presence of Elentuch he told Ellenbogen that they would have to build up a heart case. Elentuch denies that that statement was made.

All questions of the credibility of witnesses are for the jury to pass on, and perhaps I ought to observe as to all defendants they are not required to take the witness stand. They have the right not to do it. Having taken the witness stand they offer themselves to the scrutiny of the jury. Their testimony in its persuasive qualities is neither better nor worse because it proceeds from the lips of the defendants. It is to be measured exactly as the testimony of any other witness. However, with respect to all interested witnesses, the law says that the jury must be admonished that in weighing the testimony of an interested witness there must be present in your minds at all times a realization that that particular testimony proceeds from the lips of one who has something at stake in the outcome of the case.

It may be that you will wish to ask yourselves, in passing upon the guilt or innocence of Elentuch, is it likely that he [fol. 18] would have steered Ellenbogen to Garrow unless he had first acquired from Panzer an understanding and knowledge of the Garrow methods. That question is fairly posed by the evidence.

Taking up the second of these groups we find that the claimants were Schoenberg, Rubin, Cooper and Hessenberg. Of course, you are relieved of any consideration with respect to Schoenberg. Schoenberg, in your presence, pleaded guilty. Now that means that Schoenberg admitted that he became a part of this scheme to defraud the insurance companies knowingly and intentionally; that he misrepresented his physical condition in order to get money out of the companies; so that you are relieved of any consideration of that particular claimant. You will not report a verdict on him. He has relieved you of that necessity.

Rubin is a defendant as to whom it is alleged that there was medication. The proof on that subject presents one of the important issues upon which you will have to pass. Rubin denies that he took any medication. But in dis-

cussing Rubin, Cooper and Hessenberg it might be wise to reflect that, of course, a man in perfectly good health would not be expected to have the opportunity to prove disability, even with the help of medication, that a man would have whose health was in some respects impaired. So that you [fol. 19] may start in your inquiry with the assumption that to some degree each of these three claimants suffered some physical impairment. Don't waste your time on that. The question is if there was a physical impairment was there permanent, total disability. Or could the appearance of permanent and total disability be established only through the employment of fraudulent methods and means? That is the question that confronts you, and if you say, Yes, that is true, the appearance of permanent and total disability did require the use of fraudulent methods, then were those methods employed by these defendants? That is your question. So I say, and really the situation is common as to these three defendants, Rubin, Cooper and Hessenberg, did they misrepresent their actual conditions in order to induce the companies to believe that they were permanently and totally disabled?

Of course it is a striking thing that each one of them asserted a heart condition. You have probably observed that. I don't suppose there is any way to establish with mathematical certainty whether Rubin was medicated or not. But it may be possible for you to reach a conclusion on the subject, according to the required burden of proof, by considering the testimony of the various physicians, the sundry electrocardiograms, and what the defendant Rubin has revealed of himself and his mental and moral [fol. 20] processes while he was a witness on this stand. I think that those are the elements which you will have to take into consideration in reaching a conclusion as to whether he did misrepresent the nature and extent of such disability as he asserts he suffered from, in order to make the companies believe that he was permanently and totally disabled.

That evidence has been discussed for the government by Mr. Dailey, and for Mr. Rubin by his attorney, Mr. Loeb. It would not serve any useful purpose for me to go over it. I suggest to you that you give it your very careful attention, because you will have to answer that question.

The same applies to Cooper, having in mind the representation necessarily made in connection with the reinstate-

ment of a policy. You heard what he said concerning that. You must weigh it carefully, because,—and this remark applies to all witnesses, not to any one,—you do not have to believe everything that every witness tells you unless you are prepared to leave your common sense outside of the juryroom, and I know of no such requirement.

Reference was made in connection with this case to Dr. Crawford's testimony. He made a physical examination on June 18, 1938. The patient was nervous; no blue lips; no distention of the neck veins; some sclerotic changes in the arteries of the eye; pulse was weak; some thickening [fol. 21] of the radial arteries; no murmurs; the first aortic beat was faint; the second accentuated; there was a slight enlargement; during the hospital stay he was uncommunicative; spells of excitement, shouting and so forth. "I witnessed one bad attack of pain. It did not seem to be an attack of angina pectoris. No man really so suffering would have so behaved."

Dr. Rosenbaum: "Cooper gave me a history of illness on his first visit, December 7, 1932. He had a sheet of paper with history and symptoms; also a story of treatment by Dr. Straus previously."

I refer to that because of the frequent statement that has been made that histories were fabricated. There is Rosenbaum who says that such a history was given him. He is not a claimant. He is a doctor. He says that a sheet of paper was given him with a history on it. Again, of course, you do not have to believe it, but I am merely calling your attention to the fact that that testimony is present in the case.

Now Hessenberg: Also a heart condition. Moving from the known to the unknown in that case, there are false statements admitted by this defendant. You probably have not overlooked those, and it is quite important that you should ask yourselves whether there was a second, a new history presented by Hessenberg of an onset in October of 1934, [fol. 22] instead of October of 1935. The testimony of his uncle was quite clear that the seizure in the store occurred during the month of October, 1935. The statement was made for the government that Hessenberg asserted a history of an onset in October of 1934. If that is contained in one of the documents in the case I would like to see it.

Mr. Nathan: The claim was made that the attack came on in October, 1935.

The Court: I know the first claim was.

Mr. Nathan: The only claim to the insurance company was for total disability from October, 1935.

The Court: I am speaking of that new history which was said to have related to October, 1934. I mention it in my notes.

Mr. Dailey: The second paragraph there, your Honor (handing paper to Court.)

The Court: Is this Government's Exhibit 64?

Mr. Dailey: Yes, sir; and the answer, your Honor to question 9(a) in Government's Exhibit 144, the last page (handing paper to Court).

The Court: Exhibit 144 is a photostat of the insurance statement. It is dated November 28, 1936. I think the signature by Hessenberg is not contested. I think it is his testimony that he wrote out the answers himself. In answer to question 9(a), which is, "On what date did the [fol. 23] illness begin that led up to the present disability, and what was the nature of the illness?" The answer is: "Since early part of 1932 I began to suffer from diabetes and since 1934 have been suffering from heart disease."

That is an interesting statement. You will recall the testimony which is that the diabetic condition dated back to perhaps November of 1926, not 1932, and that the testimony as to the occurrence in the store fixes the month as October, 1935.

The report of Dr. Wyckoff, which is Government's Exhibit 64, has a paragraph headed "Previous history: The patient states that he has been in perfectly good health until 1932. In 1932 he began to notice that he was passing large amounts of urine and he had considerable thirst. He went to a physician who told him that he had diabetes. He did not take very good care of himself and in 1934 went to see Dr. Messman complaining of shortness of breath and palpitation, polyuria and polydypsia. He was put on a diet of carbohydrate 60, protein 150, and 40 units of insulin a day. In 1934 he began to have pain on effort and this gradually grew worse."

[fol. 24] It is fair I think to state that, if I recall the testimony of Mr. Hessenberg, he said that part of the history given to Dr. Wyckoff was stated by Dr. Messman, and that on leaving the office with Dr. Messman, he protested against the exaggerations. We have only his testimony on that subject. You may wish to ask yourselves whether he did

anything more than protest to Dr. Messman on the subject.

Not to unnecessarily repeat, your problem in dealing with these three claimants, Rubin, Cooper and Hessenberg is to answer the simple question: Did they misrepresent to the insurance companies the true nature of their physical impairments, seeking to establish permanent and total disability by reason of a heart condition, knowing that the representation was false?

In the third category of defendants are the defendants Schwartz and Goldstein. I do not purpose to discuss all the evidence which touches them any more than I have the evidence as to the other defendants. But there are certain considerations which, in fairness to you I think I should call to your attention. Each of these defendants admitted having had between fifteen and twenty cases with Garrow alone or with Garrow and Messman. Each of these defendants says that he was a consultant, that is to say, a physician who, because of his special attainments, is con- [fol. 25] sulted by other physicians with respect to the conditions of their own patients. That, I think, would be fairly accepted as a definition of a consultant—when he is consulted by other physicians, and necessarily men in that professional status hold themselves out as having special capacity in the field in which they function. They dealt with Messman and Garrow over a period of years, 1934, 1935, and 1936.

I suggest that you turn your minds back to Messman and Garrow as you observed them. I think that together they were on the witness stand a matter of about three weeks. I think you had an ample opportunity for appraising them. What do you say as to the impression that they would be likely to create on consultants? Would consultants be able to observe, during a period of dealing with those men, what their essential qualities were? Is it likely that the defendants Goldstein and Schwartz were sufficiently equipped with the powers of perception to fairly well appraise Garrow and Messman? Now bear in mind, and this is the testimony of both of those defendants, that in many cases Garrow paid their fees. You may wish to ask yourself the question as to whether that fact, in itself, would suggest anything to the mind of a consultant. Why should a lawyer be paying the fee of a patient? Again I remind you I am not suggesting the answer to these questions, but I am [fol. 26] merely pointing out to you that you may wish to ask

these questions of yourself in order to reach a conclusion as to what was present in the minds of Goldstein and Schwartz by way of understanding what they were doing in dealing with these various cases that were brought to them by Garrow or Garrow and Messman.

With reference to the defendant Schwartz there are one or two important aspects of his testimony that I think should be called to your attention, and, again reasoning from the known to the unknown, there is this incident of the substituted sputum. Schwartz says that he learned of that from Messman; Messman told him about it. Schwartz says that Messman was complaining of the service in the pathological laboratory of the hospital, and as an example of the cause for his dissatisfaction he said, "Why, I substituted sputum for this patient Kaplan, and I got a negative report." Does that reveal anything to you? Just reflect for a moment. If the prior dealings between Schwartz and Messman had been only the conventional dealings between a physician and a consultant, would the physician, Messman, out of a clear sky, and in apparent departure from the conventional relations, have blurted out, "Why here, look at this sputum I substituted with reference to Kaplan"? I wonder if I make that clear to you. Is it likely that if their prior relations had been the conventional [fol. 27] relations of a physician and a consultant, that the physician would have blurted out so damaging an observation as that, an observation which would at once brand him as entirely and completely unworthy to practice his profession? Would he blurt that out, or can you reason fairly that the statement having been made, according to Schwartz's own testimony, it is fair to conclude that it was merely one of a number of indications, perhaps the culminating one of a number of indications, of the same general character and tenor? I suggest that question to you because I think it is most important. And in connection with that you will wish to ask yourselves why it was important, or deemed to be important by the defendant Schwartz to conceal from the grand jury his knowledge of Messman and his methods? Why was it important to conceal that? If there was nothing in the antecedent relations of Messman with Schwartz, is it reasonable to assume that Schwartz would have said, "I discovered that Messman was a disgrace to his profession in the month of November or October when this Kaplan incident took place.

Up to that time I relied on him implicitly. From that day forward I had nothing to do with him." Would he have been likely to do that if that had been the fact? I think you are bound to consider that because you are continually confronted with the necessity for probing into the mental operations of these defendants as they have been dis- [fol. 28] closed to you in the testimony in this case.

In regard to Klaristenfeld's notation on that e k g,—was that a Nelson e k g or was that a Rubin e k g?

Mr. Dailey: Kaplan, your Honor.

The Court: That is an incident that you will probably wish to reflect on rather seriously for more than one reason. If I am not mistaken it took place in the month of October or November of 1935. Klaristenfeld was on the witness stand. He was a technician; he was a consultant. He was not a cardiographist, or whatever they call it. He was just a technician, and yet he wrote on this e k g, "This suggests digitalis." Now does that tell you anything about what men who held themselves out as consultants probably knew at that time with respect to the effect of digitalis upon the e k g? Were they charged with some information on the subject?

Now what happened? Klaristenfeld's notation was the subject of a dispute at once between Garrow and Klaristenfeld, and then Schwartz was called in. And what did Schwartz do? According to his own testimony—now I am not speaking about what Garrow or Messman or somebody else said—he said, "Why, take another e k g." Was there information conveyed to him at that time? Was it a shock to him to find that someone suggested the use of digitalis? Or did he react to that incident as though it were a trifling [fol. 29] thing? Those are questions I say the answers to which may help you to reach a conclusion as to the guilt or innocence of the defendant Schwartz.

Now coming to Goldstein: He again was a consultant; he again handled from 15 to 20 cases for Garrow. And he said quite frankly that he knew they were insurance cases, and he knew that Garrow preferred to have him make affirmative, positive reports to the insurance companies, but he said he did not do so in all cases, but he said that he knew that that was Garrow's preference. He was paid by Garrow. What do you say as to his conduct with Garrow over these years? Was it such as was calculated to apprise him of Garrow's activities or not? If it was not, do not hesitate

to reach that conclusion, and of course the same applies to Dr. Schwartz.

Is there anything particular in the testimony respecting Goldstein that tends to throw a little light on what he must have known and understood about this whole situation? I am going to refer to the Fradkin case, because Fradkin's testimony is worthy of your attention. The point that is involved in that is the predating of consultation with Goldstein. Now please don't think that the predating of these certificates, or the predating of treatments recited in the certificates rather, is a trifling and inconsequential thing. [fol. 30] It is not a thing that was incidentally overlooked and it might just as well be one date as another. It was of the utmost importance that the dates should be accurately and precisely stated. That is the purpose of the questions, because the answers are the things that the insurance companies have to rely upon as to the onset and the probable date of the start of disability. Now it is a serious thing, if it be the fact, that Goldstein never saw Fradkin until September of 1936, whereas he certified that he had consulted with him in the previous February. There must have been a reason for that, if that is what was done. That it was done, that is to say that there was a medical certificate which contained the statement that the first treatment was in February of 1936, I think admits of no question. I think it is not the subject of contest in this case.

Now is it the fact that Fradkin consulted Goldstein in February of 1936? Fradkin was on the witness stand before you. He is the violinist. He performs on radio programs. His compensation by one of the exhibitors over the radio was established by the payroll books and it was a continuous record. He says that he felt pain across the chest and in the arms at the least effort, and he went to Dr. Shapiro to get an e k g, and Dr. Shapiro sent him to Dr. Chandlee. He was playing over the radio with orchestras at the time. He went to Dr. Chandlee in September. She is a family doctor [fol. 31] and she took the e k g and I think Exhibit 18 is that e k g. She had never heard of either of the Garrows or Dr. Goldstein. His cousin, a Mrs. Rosen, who is an insurance broker, told him to go to the Garrows. That was after he had seen Dr. Chandlee. He saw Garrow, told his story, and he saw Dr. Messman within a month after September 1, 1936, who examined him and took an e k g. He said Fradkin was in bad shape and that he was to do nothing. (The Court

reading from notes.) "He took me to Dr. Benjamin Schwartz. Garrow accompanied me to Schwartz and he asked me symptoms. Dr. Schwartz took an e k g. Garrow was with Fradkin, but he is not sure if he was present at the examination; that is, in the room." He told Schwartz of his conversation and said that there was a three-way conversation. He reported to Garrow after the e k g was developed, and he was then sent to Dr. Goldstein. His first visit was with Garrow, and he told Dr. Goldstein the same story as he told to the other two. He had not known Goldstein until that time.

Now you will recall that it is in the Fradkin case that Goldstein's office records are missing. Does that tell you anything about knowledge on the part of the defendant Goldstein of a scheme in which Garrow and Messman concededly were engaged?

I will not discuss the Nelson e k g's any further. You understand the fact that it is asserted by the government [fol. 32] that one that was actually taken on the 15th of July is predated to the 17th of June. If you find that there was such predating, no matter how it was brought about, that may throw some light upon this fairly obscure question as to what the defendant Goldstein really did know about Garrow's enterprise.

Hochberg says that he was medicated by Goldstein. You don't have to believe Hochberg, but his testimony is before you and I think you would do well if you would consider what Hochberg had to gain by testifying falsely, if he has testified falsely, on the subject of having been medicated.

Now that Rubin letter, the letter to Rubin written on the 2nd of September, 1936, is another subject concerning which you might well spend a little time. You will recall that that letter is explained by Goldstein as having been the medium of an appointment with Rubin in which he sought to ascertain whether Rubin had money enough to consult with Dr. Wyckoff. You might look at that letter for what it may or may not teach you. Do you see anything in that letter on the subject of a consultation with Dr. Wyckoff? You may ask yourselves whether had that been the object of the letter, wouldn't it have been perfectly simple to notify Rubin that an appointment with Dr. Wyckoff had been made at a certain date, and to say: if this is not agreeable, let me [fol. 33] know? You may wish to ask yourselves whether it was necessary to have Rubin come to Goldstein's office in

order to confer with him on his ability to raise money to pay Wyckoff, in view of Goldstein's testimony that in a great many, if not all, the cases Garrow paid the fees.

There is just one more subject to which I think your attention should be directed. It was the testimony of the defendant, Goldstein, that in 1935 he was not aware of the effect of digitalis upon the e k g. I think if you will look at the e k g's, or some of them, which were used in the Sydenham Hospital, you will find that there is on the back a question as to whether the patient has received digitalis. Now why do you suppose that was there if it was an unknown thing among cardiologists that digitalis had an effect on the e k g? These are matters concerning which you ought to inquire very fully and you ought not to seek to reach an answer until you can do so to your satisfaction, and in the discharge of what you understand to be the duties which you have solemnly undertaken when you took the oath as jurors in this case.

That concludes the main charge. Are there exceptions to the charge? I am not passing on the requests.

[fol. 34] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT, OCTOBER TERM, 1940

No. 263

(Argued March 31, 1941. Decided June 2, 1941)

UNITED STATES, Appellee,

v.

MAXIMILIAN GOLDSTEIN, BENJAMIN SCHWARTZ, HERMAN RUBIN and IRVING ELENTUCH, Appellants

Appeals from judgments of conviction of the District Court for the Southern District of New York, under an indictment for using the mails to defraud and for a conspiracy to do so.

Before L. Hand, Swan and Augustus N. Hand, Circuit Judges

Theodore Kiendl for Goldstein; Lester R. Bachner for Schwartz; Benjamin Kronenberg for Elentuch; Sidney J. Loeb for Rubin.

Maxwell S. McKnight for the appellee.

OPINION

[fol. 35] L. HAND, *C. J.*:

These are appeals from convictions for a scheme to defraud—together with a conspiracy to commit the same crime. The scheme was the same as that which was before us in *United States* v. *Weiss*, 103 Fed. (2) 348; but the convictions which we then affirmed were under another indictment and all of the accused except Goldstein were different from those now at bar. The Supreme Court reversed these convictions (*Weiss* v. *United States*, 308 U. S. 321) because of the admission of certain "wire taps," and when the case went back for a new trial, a preliminary hearing was had, following the practice prescribed in *Nardone* v. *United States*, 308 U. S. 338. Before any decision had been made upon the evidence taken at this hearing, J. J. Weiss, one of the accused, pleaded guilty; thereupon the prosecution proceeded under the present indictment, which was then pending, and abandoned the "Weiss" indictment. The evidence already taken was by agreement admitted in a similar preliminary hearing begun under this indictment, at the end of which the judge decided that the prosecution should be allowed to call as witnesses two of the prime movers in the scheme, Messman and Garrow, overruling the objection that they had been induced to turn state's evidence by means of records obtained by "tapping" their wires. One of the seven accused pleaded guilty during the trial, but the other six went through to verdict, and the appellants are four of these. The important points raised are (1) that the testimony of Messman and Garrow was procured by "taps," (2) that it did not also appear that the "taps" had not served as clues leading to other evidence which had been introduced, (3) that the judge's charge was not impartial, and (4) that the evidence did not support the verdict.

In order to decide how far the use of the "taps" should have prevented the calling of Messman and Garrow, we [fol. 36] must go back to the original discovery of the frauds. Sometime before August, 1936, a number of large insurance companies, suspecting that they were being victimized, retained two firms of lawyers to run down the culprits. One Bernstein was a member of one of these firms, and in that month a man named Kipnis came to him and made an oral confession which laid bare the outlines of the

whole scheme. Kipnis had been one of the insured who had fraudulently collected upon a disability policy, and he had helped a number of others to commit similar frauds. The plan involved the insured's taking digitalis or some similar drug which would make his heart's action simulate disease, and this, together with a proper paraphernalia of cardiograms, hospital records and declarations of symptoms, was enough to evade detection by the insurers. To the success of such a scheme a confederation of lawyers, doctors—including heart specialists—and of course the insured themselves, was necessary. Kipnis inculpated Weiss and Garrow, lawyers, Messman and Goldstein, doctors, and a great many others. His story to Bernstein, as Bernstein gave it, if believed, made a complete case, but obviously he would not be believed unless thoroughly corroborated; and Bernstein set out to procure the necessary corroboration. He instructed Kipnis to keep up a front of continued participation in the scheme and he installed in Kipnis's offices a dictaphone which would record talks with visitors. Besides this, he got records of telephone talks between Kipnis and his confederates, by means of an extension receiver at which a stenographer was placed; no machine was interposed in the circuit during this period. Matters went along in this way through August and September, Kipnis meanwhile disclosing to Bernstein numerous fabricated "case histories" of fraudulent claimants. On October 8, 1936, Kipnis made a detailed and lengthy written confession which implicated Weiss, Garrow, Messman, Goldstein and [fol. 37] a great many others, and which, along with his other material, Bernstein shortly thereafter presented to Hardy, the district attorney, who on November 27th, called in a post-office inspector, Shea, to work up the case. On December 6, Shea, without any independent investigation of his own, turned in a report to Hardy in which he declared that there was ground for the indictment of 75 or more persons. Towards the end of January, 1937, Hardy had a conference with Bernstein and the other insurance lawyers at which they decided to begin the regular "tapping" of the wires of the principals in the scheme by introducing recording machines into the circuits; and this went on with some interruptions from that time until the arrest of Messman and Garrow on May 18, 1937, and even later. By these means nearly a thousand records were procured of talks between the confederates, in none of which, how-

ever, did any of the appellants at bar take part. The prosecution introduced none of these records in evidence, and they could therefore have contributed to the convictions only in two ways: they might have contained clues leading to the discovery of some of the evidence actually introduced; and they might have served in whole or in part to induce Messman and Garrow to turn state's evidence and become the chief witnesses at the trial. The prosecution denied that they were useful as clues, or that they had helped in any way except as confirmation of information which it already had. The record contains nothing to contradict the testimony of those gentlemen who had prepared the case and who swore that Kipnis's confession, the cardiograms, the insurance files and the hospital records were the sources of all their information. We should not therefore have been justified in sustaining a finding that the "taps" had served as clues, even if one had been made and if the prosecution had the burden of proof upon the issue.

There remains the question whether the "taps" served to break down either Messman or Garrow and turn them into [fol. 38] informers. The testimony of each was so vital to the case that the convictions cannot survive if the prosecution should not have been permitted to call either. Both these men were arrested on May 18, 1937, and Messman was taken at once to the district attorney's office where an assistant examined him. The assistant told him that his telephone and "all these lawyers' telephones" had been "watched"; that he might hear his own voice if he chose; that the prosecution would like to know whether he would tell everything or "play ball" with the accused; and that it knew what was going on and was not "stabbing in the dark." As he did not then break down he was put into the same cell with one, Nelson, another of the confederates, who told him and still another, Gross, that the prosecution had gathered together "an awful lot of evidence" including telephone records in which he, Nelson, had heard a talk of his own with Weiss. There was "too much dirt against us. The government has got everything." After hearing this from Nelson, Messman was on the same day taken back to the assistant's room where he confessed. On the preliminary hearing he denied that the telephone record had had anything to do with his breakdown; he said that he had seen the net gathering about him for some months before his arrest, had decided that his only chance was to plead

guilty, turn informer, make what terms he could with the prosecution, and, as to his sentence, to rely upon the help he could give to convict the others. He confessed that he was abandoned in morals, ready to do anything that would serve his turn, and showed himself utterly untrustworthy. It is indeed curious, if he had made up his mind to change front before he was arrested, that he failed to confess when he was first before the district attorney and waited until after Nelson had dilated upon the amount of evidence which had been accumulated against him. One would have expected that on his own story his arrest would have been enough to [fol. 39] touch off his confession. However, if the judge had affirmatively found that the "taps" contributed nothing to this result we should not have disturbed the finding; it is not impossible that although from the start he meant to confess, he might not have seized the first moment to do so. The difficulty is that it does not appear that the judge meant to find more than that the accused failed to prove that the "taps" had contributed to the breakdown. For this reason the issue depends upon which side had the burden of proof at the hearing.

The case for the accused is considerably weaker as to Garrow. He too was arrested on May 18, 1937, but he did not confess until nearly two years later. It is true that he did so only a few days after we had held in *United States* v. *Weiss*, 103 Fed. (2) 348, that it was proper to allow the introduction of the "taps," and the argument is not without plausibility that this sequence was causal: Still, he was not subjected to the same pressure as Messman, and like Messman he declared that the "taps" had not influenced him at all, though his word was, if possible, even less reliable. Again, we should not have disturbed an express finding, had there been one, and the issue, like that as to Messman, depends upon the burden of proof. Upon that question we have nothing to guide us but *Nardone* v. *United States*, *supra* (308 U. S. 338) and that did not actually decide the question. It is true that Mr. Justice Frankfurter did say (p. 341) that the accused had the burden of proving that the prosecution "tapped" the wires, and that if he did, the judge must give him a fair opportunity to show how far the "taps" had infiltrated into the case. He added, however, that after this had been done it would leave "ample opportunity to the Government to convince the trial court that its proof had an independent origin." That language can-

not indeed serve as a ruling that the prosecution has the burden to show how far its proof has "an independent [fol. 40] origin," but it is consonant with that position, and to some extent suggests it. In any event it appears to us that this should be the rule in analogy to the well settled doctrine in civil cases that a wrongdoer who has mingled the consequences of lawful and unlawful conduct, has the burden of disentangling them and must bear the prejudice of his failure to do so; that is, that it is unfair to throw upon the innocent party the duty of unraveling the skein which the guilty party has snarled. To impose the duty upon the prosecution is particularly appropriate here, for it necessarily has full knowledge of just how its case has been prepared; given a *prima facie* case against it, i. e., "taps" and some use of them, it should do the rest. It is true that the tendency has of late been to mollify the extreme of this requirement, substituting the best honest guess for a quantitative allocation when that is obviously impossible, so that the victim shall not get what cannot possibly be his. *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U. S. 390. But there has been no disposition to relax that feature of the doctrine which resolves all possible doubts against the wrongdoer. We content ourselves with citing some of those decisions which expressly state the reasoning. *The Idaho*, 93 U. S. 575, 585, 586; *Schnell* v. *The Vallescura*, 293 U. S. 296, 306, 307; *Brainard* v. *Cohn*, 8 Fed. (2) 13, 15 (C. C. A. 9); *United States* v. *Federal Mail Order Corp.*, 47 Fed. (2) 164, 165 (C. C. A. 2); *Samson* v. *Rose*, 65 N. Y. 411, 421; *Wellock* v. *Cowan*, 246 Mich. 45. We hold therefore that, after the accused had proved that the "taps" had been made and had to some extent been used to break down Messman and to a less degree Garrow, the burden fell upon the prosecution to satisfy the district judge that they had no part, or no substantial part, in that result. This being true, and the condition of the findings and the evidence being what we have described above, we hold that, as the record stands, the judge should have forbidden the [fol. 41] prosecution to call Messman, and probably Garrow as well, though as to him we need make no finding. In so deciding we assume that the accused were entitled to invoke the protection of §605, and that assumption we shall now consider.

The authorities on that question are very few. In *United States* v. *Seeman*, 115 Fed. (2) 371, 374, we expressly held that §605 merely conferred a privilege personal to the

"sender," though we had without discussion decided the opposite once before. *United States* v. *Bernava*, 95 Fed. (2) 310. Our own decisions are not however important if the Supreme Court has ruled otherwise; and the question is, how far the reversal, even as to Goldstein, in *Weiss* v. *United States*, *supra* (308 U. S. 321) must be taken as a holding the opposite of our ruling in *United States* v. *Seeman*, *supra*. Although, as we have said, Goldstein's wires had never been "tapped," Weiss's had been repeatedly; and there were three records of talks in which Gross had had a part and three in which Krupp had. As to Weiss it therefore was clearly necessary to decide the chief point which the court discussed; i. e. whether the statute applied to intrastate messages. As to him it was necessary to discuss the second point also—the validity of Messman's consent. All this was likewise true of the records of the talks with Gross and Krupp. As to Goldstein alone did the decisions of these questions therefore become immaterial, assuming that § 605 is limited to a personal privilege of the "sender." This made it very natural for a court to disregard that point even though, as was the case, the prosecution raised it in its brief. Strictly it would indeed have been still possible to affirm Goldstein's conviction and reverse the others', but the result would have been extremely harsh. It would have presupposed that a fair trial of the others could have been had, though the forbidden records were actually introduced in evidence provided that the jury had been admonished to use them only against Goldstein. [fol. 42] Such an admonition would have been practically valueless in a case like this, and the court might well have refused to affirm Goldstein's conviction when, if the trial had been fairly conducted throughout, the records would not have gone into evidence at all. It is indeed always a matter of the greatest delicacy to say that the decision of a superior court is not to be taken as authoritative upon a point not discussed; yet there are occasions when unless we do so, we shut our eyes to the fact that in every probability it was not decided at all. It seems to us that this is such an occasion, and that the matter is open.

Our reasons for thinking that if it is open, the convictions may stand are as follows. It is well settled that, although the victim of a search, unlawful under the Fourth Amendment, has a privilege to exclude any evidence against him procured in its course, the privilege is personal to him, and

that no one else can avail himself of the violation, however scandalous that may have been. In *Connolly* v. *Medalie*, 58 Fed. (2) 629, we so decided and collected the cases up to that time which were very numerous and unanimous; and there has been no divergence since that time. Although the Supreme Court has never expressly passed upon that question, it has dealt with the privilege against self crimination under the Fifth Amendment in the same way. *Hale* v. *Henkel*, 201 U. S. 43, 69, 70. It is true that these privileges are considered as in part sanctions against the violation of the Constitution—being, in the case of searches, additional to the criminal sanctions imposed by statute (§§ 53a, 630 and 631, Title 18) and it is also true that they could have been made still stronger by forbidding the use of the evidence against everyone. Immunity was not carried so far; it was thought enough if only the injured person is protected. This was in accord with the law of privileged communications generally, for the communication is not itself privileged, only its disclosure. An eavesdropper, or a se-
[fol. 43] creted dictaphone, may record and repeat whatever is said, whether the communication be between attorney and client (*Rex* v. *Simons*, 6 C. & P. 540; *State* v. *Center*, 35 Vt. 378, 382, 386; *Hoy* v. *Morris*, 13 Gray 519), between spouses (*Commonwealth* v. *Wakelin*, 230 Mass. 567, 574; *Knight* v. *State*, 114 Ga. 48; *Commonwealth* v. *Eversen*, 123 Ky. 330) or between physician and patient (*Springer* v. *Byram*, 137 Ind. 15). Furthermore, if a witness who should claim the privilege fails to do so, his testimony is competent and its admission is not an error of which a third party may complain. Wigmore § 2196. True, when the witness does claim the privilege and it is erroneously overruled, apparently a majority of courts make the error available to third parties, but there can be no doubt that Professor Wigmore is right in holding with the minority, unless the third party shares that interest which alone justifies suppression of the truth.

So far therefore as § 605 conferred a personal privilege on the "sender," there can be no doubt, it seems to us, that he alone can invoke it. It plainly does confer such a privilege, for the "sender" may consent to the divulgence of the message after it has been unlawfully intercepted. (The discussion of the second point in *Weiss* v. *United States*, *supra* (308 U. S. 321) presupposed exactly that; and it necessarily follows from the "sender's" privilege to divulge messages which have not been intercepted at all.

The question thus comes down to whether, when the "sender" has not consented, a third party may vicariously invoke the prohibition for his own protection. In form the language is indeed imperative: "no person not being authorized by the sender shall intercept * * * and divulge or publish" the message; moreover § 501 makes divulgence a crime. In this respect § 605 is therefore unlike those statutes which punish an unlawful search, but which do not punish the use of the evidence procured. Yet, although there cannot for this reason be any question that only the [fol. 44] consent of the "sender" will condone the divulgence of an intercepted message, it does not follow that anyone else can complain of the wrong. Certainly "senders" alone are within the protected class (if it were not so, their consent would not excuse divulgence) and the purpose could not have been more than to protect the secrecy of their talks. For example, nobody but a "sender" could sue civilly for a violation of the section. *St. Louis & San Francisco R. R. Co.* v. *Conarty*, 238 U. S. 243; *Lang* v. *New York Central R. R. Co.*, 255 U. S. 455; *Gorris* v. *Scott*, L. R. 9 Ex. 125; *Boronkay* v. *Robinson & Carpenter*, 247 N. Y. 365; Restatement of Torts § 286. Nor can it be urged as a distinction that that doctrine is limited to cases where a party seeks affirmative relief for a violation of the statute; for that is what the accused at bar are seeking. The proscribed evidence, taken by itself, is entirely competent, and could be produced but for its wrongful acquisition; the accused must persuade the court to forbid its use; they ask a remedy for a wrong done to them and they must have some standing to complain. They have no standing unless they can show an interest which will be invaded by the divulgence and which the law will recognize. They do indeed have an interest which is invaded, but it is not one that the law will recognize. It is nothing better than that evidence, which shows them to have committed a crime, shall be suppressed because they are deeply interested in not being punished for that crime. If they were defendants in an equity suit, they might succeed, for a defendant in equity need not be the victim of the wrong which disqualifies the plaintiff to seek an equitable remedy, provided it is closely enough interwoven with the legal transaction involved in the suit. But, so far as we know, there is no doctrine that a criminal prosecution can be defeated by showing that the prosecutors must commit a wrong—civil or criminal—to

prove their case. Such considerations are relevant indeed [fol. 45] between them and their superiors, but these the accused does not vicariously represent. Indeed, in this particular application of such a doctrine if it existed, the curious result would be that the event would turn upon which side succeeded in securing the favor of the "sender"—a person who might very well have no interest of his own in the divulgence of the message.

Finally, whatever may be thought of the foregoing, it so chances that in the case at bar the convictions can stand even if the section does so peremptorily forbid divulgence of a message that anyone can take advantage of its violation. This is so because the section prohibits only the divulging of the message, not its use after it has been divulged, and in the case at bar no message was divulged upon the trial. The prosecution had indeed committed a crime earlier, and by hypothesis the evidence it introduced was the fruit of that crime; but that was all in the past and before the trial came on; no further violation of the section were then necessary. We of course do not forget that it is precisely the use of evidence obtained by such divulgence that *Nardone* v. *United States, supra* (308 U. S. 338) condemned, but the distinction between divulgence of the message by the very act of introducing it, and introducing evidence acquired by past divulgence, is nevertheless critical. For the only possible escape from those authorities which limit to the victim of an unlawful search the objection to evidence procured by the search, lies in the fact that § 605 expressly forbids divulgence as well as acquisition—"interception"—while the Fourth Amendment and its implementing statutes forbid only acquisition. When therefore as here the question arises of evidence procured by an earlier unlawful divulgence the parallel between the situation and that of an unlawful search becomes perfect; and it would be a curious result, if a violation of the section were more sweepingly condemned than a violation of the Constitution. Aside from the difference in authority be- [fol. 46] tween the two, the wrongs involved are so different in their heinousness: an unlawful search may be the invasion of the home itself, an outrage which no people will endure which still dares call itself free; the interception of a telephone message, enraging as it is, is not worse than other violations of secrecy which the law countenances.

The only other point which needs extended discussion is the judge's charge. This was long and detailed; he repeatedly advised the jury that they were not to take as authoritative any opinions he might venture as to the facts. He then put before them a number of questions whose answers they might, he thought, find important or even critical in deciding the guilt or innocence of the accused. These he did indeed couch in such a way as to make fairly apparent what answers he would himself have given to them; and it must be owned that the answers were damaging. The questions were, however, the sum of all that could be thought to invade the jury's province, and they occurred in a long charge, prefaced by overabundant caution, as we have said. The situation was thus quite different from that in *United States* v. *Murdock*, 290 U. S. 389—the last pronouncement of the Supreme Court—in which by a divided vote it affirmed the reversal of a conviction in which the judge had told the jury that the prosecution had "proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt" (p. 393). Such an unequivocal declaration upon the very issue had an impact immensely more persuasive than the oblique intimations to be drawn from the questions put to the jury here. The judge did not "distort * * * or add to" the evidence; what he did do was to "comment in order to give appropriate assistance" to the jury. *Quercia* v. *United States*, 289 U. S. 466, 470. Nor is it true that he presented the evidence unfairly. In such cases it is seldom possible to say more in the accused's favor than that he denies any complicity [fol. 47] with the chief participants in the scheme; the real question is how far the prosecution has succeeded in enmeshing him in a web of circumstance strong enough to withstand those denials. While the judge might have pointed out possible holes in that web, "fairness" does not mean neutrality; he was in some measure responsible for the result, and his conclusions—though he really told them none—if presented, without heat or bias were a proper guide to the jury. (The belief very commonly held by judges that a jury is excessively subject to the judge's influence, my own experience at least did not bear out. I found them generally quite robust enough to form their own opinions independently of any indications I might give them of mine.) In our decisions we have repeatedly gone farther than the judge did here. *Safford* v. *United States*, 252 Fed.

Rep. 471; *Dillon* v. *United States*, 279 Fed. Rep. 639 (this decision was probably overruled by *United States* v. *Murdock*); *United States* v. *Frankel*, 65 Fed. (2) 285, 288; *United States* v. *Dilliard*, 101 Fed. (2) 829, 835; *United States* v. *Bob*, 106 Fed. (2) 37, 41.

Some of the accused argue that there was no "credible" evidence to sustain the verdict; upon the theory that the testimony of Messman and Garrow was not enough. But the credibility of even such witnesses as they is for the jury; whether their testimony should satisfy all reasonable doubts is not a matter which the courts will review. In the case at bar nobody disputes that a number of persons did actually engage in a wide scheme to defraud the insurance companies; or that all the accused were associated in one way or another with those who concocted it. Whether that was a guilty or an innocent association was the only question left open, and the testimony was ample that it was a guilty one, if the jury chose to believe the witnesses.

As to Elentuch, he was shown to have been active in the conspiracy at least as late as December, 1936, and he did not prove that his connection ended before his first confes- [fol. 48] sion which was in July, 1937. The present indictment was filed in March, 1940, and was therefore in season, regardless of the first indictment which it superseded. *United States* v. *Strewl*, 99 Fed. (2) 474, 477 (C. C. A. 2).

Finally, we cannot say that on the preliminary hearing the judge unduly limited examination by the accused. It is extremely difficult to glean from the record just what limits he did draw, and how far the accused meant to complain when he drew any. The Supreme Court in *Nardone* v. *United States*, *supra*, 341, 342 (308 U. S. 338) clearly meant that the existence of "taps" should not become an excuse for the exposure before trial of all the prosecution's evidence. As in cases of discovery, criminating evidence, or the theft of trade secrets, there is always theoretically a contradiction in inquiring into the existence of facts the propriety of whose disclosure can strictly be determined only after they are known. For such situations there is no *vade mecum* and the judge must feel his way; he need not allow the same searching cross examination that is ordinarily the privilege of the inquiring party. In the case at bar the judge did indeed express himself once or twice in a way that seemed to restrict the examination unduly; but taking his rulings in bulk together with the accused's complaisance

we cannot say that he held them on too tight a rein. Besides, in the view we take this point is obviously immaterial for two reasons: the prosecution was not shown to have carried its burden of proving how far the "taps" contributed to Messman's or Garrow's breakdown; and the accused had in any event no standing to prevent the calling of either at the trial.

The other errors alleged require no mention.

Convictions affirmed.

[fol. 49] In United States Circuit Court of Appeals, Second Circuit

United States of America, Plaintiff-Appellee,

vs.

Maximilian Goldstein, Benjamin Schwartz, Herman Rubin and Irving Elentuch, Defendants-Appellants

Judgment—Filed June 18, 1941

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and hereby are affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 50] Supreme Court of the United States, October Term, 1941

No. 256

Order Granting Motion for Leave to Proceed in Forma Pauperis—October 13, 1941

On Consideration of the motion for leave to proceed further herein in *forma pauperis*.

It is Ordered by this Court that the said motion be, and the same is hereby, granted.

Mr. Justice Jackson took no part in the consideration and decision of this motion.

[fol. 51] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1941

No. 256

ORDER ALLOWING CERTIORARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration and decision of this application.

Endorsed on cover: In *forma pauperis*. Enter petitioners pro se. File No. 45,584. U. S. Circuit Court of Appeals, Second Circuit. Term No. 256. Dr. Maximilian Goldstein, Dr. Benjamin Schwartz, Herman Rubin and Irving Elentuch, Petitioners, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed July 11, 1941. Term No. 256 O. T. 1941.